No. 40

In the Supreme Court of the United States

October Term, 1948.

OKLAHOMA TAX COMMISSION, *Petitioner,*

vs.

THE TEXAS COMPANY, *Respondent.*

MOTION OF R. O. MASON AND HAYES McCOY FOR PERMISSION TO FILE SECOND BRIEF *AMICI CURIAE*, AND SECOND BRIEF *AMICI CURIAE*.

R. O. MASON,
HAYES McCOY,
Bartlesville, Oklahoma,
Amici Curiae.

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Come now R. O. Mason and Hayes McCoy and move the Court for an order permitting them to file a Second Brief *Amici Curiae*, and as grounds therefor, show the Court that the attorney for the petitioner in its reply brief filed herein takes the position that the Congress has no power under Article I, Section 8, of the Constitution to control the leasing for oil and gas mining purposes of the lands of the Indian of interest, and the development, production, and operation under such a lease on the ground the Congress only has power to regulate commerce with Indian tribes and not with individual members of Indian tribes.

Hayes McCoy

R. O. Mason

HAYES McCOY,

R. O. MASON,

Both of Bartlesville, Okla.,

Amici Curiae.

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SECOND BRIEF *AMICI CURIAE.*

The question for decision in this suit is, Does the State of Oklahoma have the power to levy the taxes here involved without the consent of the Congress of the United States?

The Congress is vested by Article I, Section 8, of the Constitution with power to regulate commerce with Indian tribes. The word "commerce" is not defined in the Constitution. This Court in *Gibbons* v. *Ogden*, 22 U. S. 189, 6 L. ed. 23, said:

> "Commerce, undoubtedly, is traffic, but it is something more; it is intercourse."

The Congress and the judiciary ever since they commenced functioning have ascribed to the word "commerce," with respect to Indian tribes, a meaning embracing all intercourse with Indian tribes and with members of Indian tribes. The Congress under such power ever since it commenced functioning has dealt with Indian tribes and individual members of such tribes as wards of the government.

It has controlled, and now controls, the restricted lands of restricted Indians and the right of such Indians to sell such land or to encumber the same by lease for grazing and agricultural purposes and by lease for mining purposes or otherwise. The Secretary of the Interior under the power conferred by the Congress supervised the leasing for oil and gas purposes of the land of the Indian of interest in this suit, and now supervises the development and operation under such lease. This Court in *Childers, etc.*, v. *John Beaver, et al.*, 270 S. C. 555, 70 L. ed. 730, said:

> "It must be accepted as established that during the trust or restrictive period Congress has power to control lands within a state which have been duly allotted to Indians by the United States and thereafter conveyed through trust or restrictive patents. This is essential to the proper discharge of their duty to a dependent people; and the means or instrumentalities utilized therein cannot be subjected to taxation by the state without assent of the Federal Government."

Not only does the Congress have the power under said Article I, Section 8, of the Constitution, to regulate the leasing for oil and gas purposes of restricted lands of restricted Indians and the development, production, and operation under such leases and the power to regulate Indian tribes, control tribal lands, allot lands to tribal members, impose restrictions against the sale or encumbrance of allotted lands and free tribal lands and allotted lands from taxation by the states, but long continued legislative and executive usage and an unbroken current of judicial decisions have attributed to the United States as a superior and civilized nation the power and the duty of exercising a fostering care and protection over all dependent Indian communities within its borders, whether within its original territory or territories subsequently acquired, and whether within or with-

out the limits of a state. *United States* v. *Kagama*, 118 U. S. 375, 30 L. ed. 228; *United States* v. *Sandoval*, 231 U. S. 28, 58 L. ed. 107. The following acts are a few instances of the exercise of such power: The Act of February 8, 1887, being the General Allotment Act, 24 Stats. L. 388; the Act of June 28, 1898, providing for the allotment of the lands of Choctaw and Chickasaw Indians in Indian Territory, 30 Stats. L. 495; the Act of July 1, 1898, being an act to ratify the agreement between the Dawes Commission and the Seminole Nation of Indians, 30 Stats. L. 567; the Act of March 1, 1901, being an act to ratify and confirm an agreement with the Muskogee or Creek Tribe of Indians and for other purposes, 31 Stats. L. 861; the Act of July 1, 1902, being an act to provide for the allotment of the lands of the Cherokee Nation for the disposition of townsites therein and for other purposes, 32 Stats. L. 716; the Act of June 28, 1906, being an act for the division of the lands and funds of the Osage Indians in Oklahoma Territory and for other purposes, 34 Stats. L. 539. Each of these acts provides for the allotment in severalty of the lands of the tribe to which they apply to the members of the tribe, provides restrictions against alienation and provides freedom from taxes. The Act of May 27, 1908, being an act for the removal of restrictions from a part of the lands of allottees of the Five Civilized Tribes and for other purposes, 35 Stats. L. 312. This act, among other things, provides:

> "* * * That leases of restricted lands for oil, gas or other mining purposes, leases of restricted homesteads for more than one year and leases of restricted lands for periods of more than five years, may be made, with the approval of the Secretary of the Interior, under rules and regulations provided by the Secretary of the Interior, and not otherwise: * * *"

The Act of March 3, 1921, being an act to amend Section 3 of the Act of Congress of June 28, 1906, entitled, "An Act for the division of the lands and funds of Osage Indians in Oklahoma, and for other purposes." 41 Stats. L. 1249. This act, among other things, provides:

> "That from and after the passage of this act the Secretary of the Interior shall cause to be paid at the end of each fiscal quarter to each adult member of the Osage tribe having a certificate of competency his or her *pro rata* share, either as a member of the tribe or heir of a deceased member, of the interest on trust funds, the bonus received from the sale of leases, and the royalties received during the previous fiscal quarter, and so long as the income is sufficient to pay to the adult members of said tribe not having a certificate of competency $1,000 quarterly except where incompetent adult members have legal guardians, in which case the income of such incompetents shall be paid to their legal guardians, * * *"

and the Act of February 27, 1925, being "An Act to amend the Act of Congress of March 3, 1921, entitled, 'An Act to amend Section 3 of the Act of Congress of June 28, 1906, entitled, "An Act of Congress for division of lands and funds of the Osage Indians in Oklahoma, and for other purposes".'" This act, among other things, provides:

> "No guardian shall be appointed except on the written application or approval of the Secretary of the Interior for the estate of a member of the Osage Tribe of Indians who does not have a certificate of competency or who is of one-half or more Indian blood. All moneys now in the possession or control of legal guardians heretofore paid to them in excess of $4,000 per annum each for adults and $2,000 each for minors under the Act of Congress of March 3, 1921, relating to the Osage Tribe of Indians, shall be returned by such

guardians to the Secretary of the Interior, and all property, bonds, securities, and stock purchased, or investments made by such guardians out of said moneys paid them shall be delivered to the Secretary of the Interior by them, to be held by him or disposed of by him as he shall deem to be for the best interest of the members to whom the same belongs."

Such power of the Congress has seldom been questioned since the government was formed. The members of the Bar have generally conceded such power and the courts have sustained it. Very few, if any, sessions of the Congress are held without the Congress enacting some law with respect to some Indian tribe and with respect to members of some Indian tribe.

The State of Oklahoma is without power to supervise or control the development, production, and operation under the lease presented in this suit. It has never done so. The officials and employees of the United States charged with the duty of supervising and controlling the development, production, and operation under this lease have cooperated with the Corporation Commission of the State of Oklahoma, the agency of the state empowered to supervise and control the development, production, and operations under unrestricted oil and gas leases. The Congress recognizing the lack of power of the State of Oklahoma to grant its Corporation Commission, or any other official or agency, authority to control the development, production and operation under restricted Indian leases of members of the Five Civilized Tribes and desiring to consent to the application thereto of the laws of the State of Oklahoma and of the orders, rules, and regulations promulgated by said Commission, in the Eightieth Congress, First Session, on the conditions provided, consented to such application.

Public Law 336 (H. R. 3173), approved August 4, 1947, Section 11 of which act is as follows:

"All restricted lands of the Five Civilized Tribes are hereby made subject to all oil and gas conservation laws of Oklahoma: *Provided*, That no order of the Corporation Commission affecting restricted Indian land shall be valid as to such land until submitted to and approved by the Secretary of the Interior or his duly authorized representative."

The current Conservation Law of Oklahoma, Title 52, Chap. 3a, of Session Laws of Oklahoma 1947, Section 1, Subsection (a) in part provides:

"To prevent or to assist in preventing the various types of waste of oil or gas prohibited by statute, or any of said wastes, or to protect or assist in protecting the correlative rights of interested parties, the Commission, upon a proper application and notice given as hereinafter provided, and after a hearing as provided in said notice, shall have the power to establish well spacing and drilling units of specified and approximately uniform size and shape covering any common source of supply, or prospective common source of supply, or oil or gas within the State of Oklahoma. Such order establishing well spacing or drilling units for a common source of supply may be entered after a hearing upon the petition of any person owning an interest in the minerals in lands embraced within such common source of supply, or the right to drill a well for oil or gas on the lands embraced within such common source of supply, or on the petition of the Conservation Officer of the State of Oklahoma.",

in Paragraph (b) Subsection (1), second paragraph, in part provides:

"The order establishing such spacing or drilling units shall set forth: (1) the outside boundaries of the surface area included in such order; (2) the size, form,

and shape of the spacing or drilling units so established; (3) the drilling pattern for the area, which shall be uniform; and (4) the location of the permitted well on each such spacing or drilling unit.",

and in Subsection (d) of said section in part provides:

"The drilling of any well or wells into any common source of supply for the purpose of producing oil or gas therefrom, after a spacing order has been entered by the Commission covering such common source of supply, at a location other than that fixed by said order is hereby prohibited. The drilling of any well or wells into a common source of supply, covered by a pending spacing application, at a location other than that approved by a special order of the Commission authorizing the drilling of such well, is hereby prohibited. The operation of any well drilled in violation of any spacing so entered is also hereby prohibited. When two (2) or more separately owned tracts of land are embraced within an established spacing unit, or where there are undivided interests separately owned, or both such separately owned tracts and undivided interests embraced within such established spacing unit, the owners thereof may validly pool their interests and develop their lands as a unit. Where, however, such owners have not agreed to pool their interests, and where one such separate owner has drilled or proposes to drill a well on said unit to the common source of supply, the Commission, to avoid the drilling of unnecessary wells, or to protect correlative rights, shall, upon a proper application therefor and a hearing thereon, require such owners to pool and develop their lands in the spacing unit as a unit.",

and further, in the last paragraph of said Section 1, in part provides as follows:

"In the event a producing well, or wells, are completed upon a unit where there are, or may thereafter be, two (2) or more separately owned tracts, any royal-

ty owner or group of royalty owners holding the royalty interest under a separately owned tract included in such spacing unit shall share in the one-eighth (1/8) of all production from the well or wells drilled within the unit, or in the gas well rental provided for in the lease covering such separately owned tract or interest in lieu of the customary fixed royalty, in the proportion that the acreage of their separately owned tract or interest bears to the entire acreage of the unit; * * *."

It is not unusual for a spacing or drilling unit to contain restricted land of a restricted Indian and unrestricted land of a non-Indian. Apart from said Act of Congress of August 4, 1947, there is no power to compel a restricted Indian as to his restricted land in a spacing or drilling unit to pool the royalty under his lease with the royalty under another Indian lease or with the royalty under a non-restricted lease in such spacing or drilling unit. If he should decline to do so, the lessees in the respective leases are stymied in that they have no authority to pool the royalty, and the owner of the unrestricted lease, if he drills, violates such law and subjects himself to the penalties therein provided. In instances where the restricted Indian enters into an agreement with the royalty owners under another restricted lease or an unrestricted lease pooling the royalty under such leases each such agreement requires the approval of the Secretary of the Interior. The Act of August 4, 1947, eliminates the necessity for such agreements and such approval as to the Five Civilized Tribes where said Corporation Commission has made a spacing order and the Secretary of the Interior has approved such order.

The quotation from the last paragraph of said Section 1 and any orders made by the Corporation Commission cannot operate on the lease presented in this case or on any lease of any member of any wild tribe. The Congress has never

consented to such operation as to the wild tribes of Indians. The Congress only can permit such operation and it has not consented thereto. Said provisions and the other provisions of the Conservation Law and the orders of the Corporation Commission thereunder have no application to restricted leases of restricted members of the Five Civilized Tribes until the Secretary of the Interior approves such orders.

The Congress has plenary power over commerce with the Indians. The State of Oklahoma has no power to levy the taxes here involved without the consent of the Congress. It does not represent the Congress has consented to the levy thereof.

The Congress of the United States has never consented to the levy of these taxes.

The decision of the Supreme Court of Oklahoma in this suit is correct and should be affirmed.

Respectfully submitted,

R. O. Mason,
Hayes McCoy,
Both of Bartlesville, Okla.,
Amici Curiae.